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UNILEVER UNITED STATES, INC.,
8 UNILEVER SUPPLY CHAIN, INC., and
the PEPSI-LIPTON PARTNERSHIP (erroneously sued as
9 PEPSICO, INC.)

10
11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN JOSE DIVISION
14

15 AMY MAXWELL, individually and on behalf of
all others similarly situated,

16 Plaintiff,

17 v.

18 UNILEVER UNITED STATES, INC.,
19 UNILEVER SUPPLY CHAIN, INC., and
PEPSICO, INC.,

20 Defendants.
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Case No. CV12-01736-EJD

**DEFENDANTS UNILEVER
UNITED STATES, INC., UNILEVER
SUPPLY CHAIN, INC., AND
PEPSICO, INC.'S REQUEST FOR
JUDICIAL NOTICE IN SUPPORT
OF THEIR MOTION TO DISMISS**

[[Proposed] Order Granting Request For
Judicial Notice [Defendant's Motion To
Dismiss Concurrently Filed]

Hearing Date:
Time:
Judge: Hon. Edward J. Davila
Action Filed: April 6, 2012

I. INTRODUCTION

Pursuant to Rule 201 of the Federal Rules of Evidence and related authority, Defendants Unilever United States, Inc., Unilever Supply Chain, Inc., and the Pepsi-Lipton Partnership (referred to collectively as “Unilever” or “Defendants”) respectfully request judicial notice of the following exhibits, which are attached hereto:

- **Exhibit A:** Table of recent “misbranding” cases recently filed in this District
- **Exhibit B:** Lipton PURELEAF Iced Tea, bottled label
- **Exhibit C:** Lipton Iced Green Tea Mandarin & Mango To Go Sticks label
- **Exhibit D:** Lipton VANILLA CARAMEL TRUFFLE Flavored Black Tea label
- **Exhibit E:** Lipton GREEN TEA Naturally Decaffeinated label
- **Exhibit F:** Lipton White Tea Raspberry Flavor, bottled label
- **Exhibit G:** Lipton Cold Brew Iced Tea label
- **Exhibit H:** Lipton Decaffeinated Tea label

II. ANALYSIS

A. Identifying Information of Other Cases Is Judicially Noticeable.

Exhibit A, which is a table listing the identifying information of recent misbranding cases filed by Plaintiff’s Counsel, is judicially noticeable. *See Estate of Blue v. Cnty. of Los Angeles*, 120 F.3d 982, 984 (9th Cir. 1997) (judicial notice of papers filed in other court proceedings).

B. Product Labels Are Judicially Noticeable.

Exhibits B through H, which are the packaging labels for Defendants’ products, are judicially noticeable. Plaintiff’s Complaint challenges Defendants’ labeling practices for seven of their Lipton Tea products. (Complaint for Damages, Equitable and Injunctive Relief (“Compl.”) ¶ 74.) Plaintiff’s Complaint lists the products at issue and includes photographs of the labels of the products Plaintiff allegedly purchased. (*Id.*) Because the photographs are of poor quality and the Complaint has put Defendants’ products and product labels into issue, the Court should take judicial notice of the legible label copies attached as Exhibits B through H. The concurrently filed Cindy Tran declaration (“Tran Declaration”) and Jennifer Antczak declaration (“Antczak Declaration”) authenticate these exhibits. (Tran Decl. ¶¶ 4-8; Antczak Decl. ¶¶ 4, 5.)

1 The Court may take judicial notice of Exhibits B through H in considering Defendants’
 2 Motion to Dismiss. Rule 201(b) of the Federal Rules of Evidence authorizes courts to take
 3 judicial notice of facts that are “not subject to reasonable dispute” and that are “capable of
 4 accurate and ready determination by resort to sources whose accuracy cannot be reasonably
 5 questioned.” Fed. R. Evid. 201(b); *United States v. Ritchie*, 342 F.3d 903, 907-09 (9th Cir. 2003).
 6 This Court “may treat such a document as part of the complaint, and thus may assume that its
 7 contents are true for purposes of a motion to dismiss under Rule 12(b)(6).” *Ritchie*, 342 F.3d at
 8 908 (noting that such consideration does not convert “the motion to dismiss into a motion for
 9 summary judgment”).

10 The Ninth Circuit recognizes the authority of courts to consider a document in ruling on a
 11 Rule 12(b)(6) motion to dismiss when the plaintiff’s complaint necessarily relies upon it.
 12 *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998); *see also In re Silicon Graphics Inc. Sec.*
 13 *Litig.*, 183 F.3d 970, 986 (9th Cir. 1999) *abrogated on other grounds by S. Ferry LP v. Killinger*,
 14 542 F.3d 776 (9th Cir. 2008); *Knieval v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (allowing
 15 judicial notice of documents incorporated into a complaint by reference). As the Ninth Circuit
 16 has explained, the policy concern underlying the rule is to “[p]revent [the] [p]laintiff from
 17 surviving a Rule 12(b)(6) motion by deliberately omitting references to documents upon which
 18 [their] claims are based.” *Bunag v. Aegis Wholesale Corp.*, No. C 09-00558 MEJ, 2009 WL
 19 2245688, at *3 (N.D. Cal. July 27, 2009) (citing *Parrino*, 146 F.3d at 706) (internal emphasis
 20 omitted).

21 In *Wright v. General Mills*, the district court took judicial notice of the product labels and
 22 packages at issue in that suit, holding: “Under the incorporation by reference doctrine, courts
 23 may also consider documents ‘whose contents are alleged in a complaint and whose authenticity
 24 no party questions, but which are not physically attached to the [plaintiff’s] pleading.’” No.
 25 08cv1532 L(NLS), 2009 WL 3247148, at *4 (S.D. Cal. Sept. 30, 2009) (citing *In re Silicon*
 26 *Graphics Inc. Sec. Litig.*, 183 F.3d 970 at 986). Because Exhibits B through H are documents
 27 upon which Plaintiff’s claims are based, judicial notice of them should be granted.
 28

Judicial notice of the product labels is particularly appropriate here because under California law “the primary evidence in a false advertising case is the advertising itself.” *Brockey v. Moore*, 107 Cal. App. 4th 86, 100 (2003). Furthermore, neither party can reasonably dispute the authenticity of the product label packages, considering Plaintiff included copies of them in her Complaint. (Compl. ¶ 74.)

III. CONCLUSION

The Court should grant Defendant’s request for judicial notice pursuant to Federal Rule of Evidence 201.

Dated: July 9, 2012

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